



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 8, 1994

Ms. Judith M. Porras
General Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR94-724

Dear Ms. Porras:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27489.

The General Services Commission (the "commission") has received a request for information relating to an asbestos abatement contract. Specifically, the requestor seeks "the Contractor Qualifications submitted (or on file) for all of the qualified specification holders for the [Stephen F. Austin State Office Building, Project No. 94-087-303] project," to the extent that they do not contain "financial information concerning the companies" or "customer list[s]." In addition, the requestor seeks "the approved contractors qualification information that was required by Maxim Engineers." You have submitted the requested information to us for review and claim that the commission may withhold it from required public disclosure under subchapter C of the Open Records Act.

Section 552.301(a) of the Government Code provides:

A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 provides:

If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

The request, sent by certified mail, is dated June 7, 1994, and was received by the commission on June 8, 1994. You requested a determination of this office by letter dated July 8, 1994. On the basis of these facts, we conclude that the commission failed to request a decision within the 10 day period section 552.301(a) of the Government Code mandates.

When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) at 1-2. The governmental body must show a compelling reason to withhold the information to overcome this presumption. *See Hancock, supra*. Normally, a governmental body can overcome the presumption of openness by a compelling demonstration that the governmental body should not release the requested information to the public, *i.e.*, that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You seek to withhold the requested information under sections 552.101, 552.104, and 552.110 of the Government Code.¹

Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. We have received a response only from Total Abatement Systems Corporation ("TASCO").² TASCO claims that section 552.110 of the Government Code excepts some of the requested information from required public disclosure.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or

¹Section 552.104 is designed to protect only a governmental body's interests. *See generally* Open Records Decision No. 541 (1990). Thus, your failure to assert section 552.104 within the ten days required by section 552.301 constitutes a waiver of the exception.

²The other companies did not respond. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2. Accordingly, the commission may not withhold the proposals of any of the companies that did not respond.

confidential by statute or judicial decision. TASCO claims that "Present Projects and Completed Projects Listings" and "Updated Financial Records" parts of its proposal constitute "trade secrets" and "commercial or financial information." We first address the "trade secrets" branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.³

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

We have examined the arguments submitted to us for review. We conclude that TASCO has not made a prima facie case that any part of its proposal constitutes a trade secret. Accordingly, the TASCO proposal may not be withheld from required public disclosure under the trade secret branch of section 552.110 of the Government Code.

Next, we address the "commercial or financial information" branch of section 552.110. "Commercial or financial information" may be withheld from required public disclosure under section 552.110 if it is privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991). TASCO has cited no statute or judicial decision, nor are we aware of any, that makes any part of TASCO's proposal privileged or confidential. We conclude that the TASCO proposal may not be withheld under the "commercial or financial information" branch of section 552.110 of the Government Code.

We note, however, that the requestor has specifically indicated that he does not seek customer lists or financial information concerning the companies. Therefore, it is not clear whether the information that TASCO seeks to protect under section 552.110 falls within the scope of the request. If you conclude that the information TASCO seeks to withhold is within the scope of the request, the commission must release the information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 27489

(Footnote continued)

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2; 306 at 2 (1982); 255 (1980) at 2.

Enclosures: Submitted documents

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